(3)

No. 04-1062

Supreme Court, U.S.
FILED
MAR 16 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STEVEN RUSHING,
Petitioner

v.

THE BOARD OF SUPERVISORS
OF THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

On Petition for A Writ of Certiorari
To the First Circuit Court of Appeal of
The State of Louisiana

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent does not appear to seriously contest that Petitioner's arguments implicate weighty constitutional or statutory issues which merit this Court's review, especially in light of this Court's recent grant of certiorari in *Garcetti v. Ceballos* (U.S. S.Ct. Docket 04-473) (cert. granted Feb. 28, 2005). Instead, Respondent is reduced to arguing that this case is an inappropriate vehicle for resolution of the issues raised, based on the lower courts' factual findings as to the nature of the speech made by the Petitioner as a public employee, and the Louisiana University's response to Dr. Rushing's grievances. Respondent's attempt to render this case factually *sui generis* should be unavailing.

This case presents the same complex of facts, and at least one common legal issue, with that already granted for review in *Garcetti*. Even if this Court were indisposed to grant plenary review here, this Petition should be held pending disposition of *Garcetti*. At a bare minimum, Dr. Rushing's case presents the same threshold question of whether a public employee's speech, which has a partially private motive, is nonetheless disqualified as being of "public concern," within the meaning of this Court's holding in *Connick v. Myers*, 461 U.S. 138 (1983). Additionally, Petitioner raises significant questions as to the contours of this Court's employment retaliation jurisprudence and cognizable property rights for academics at public universities. Review should be granted.

1. On February 28, 2005, this Court granted review in *Garcetti v. Ceballos*, docket 04-473 (U.S. Feb. 28, 2005). As denominated by the Petitioner in that case, the Questions Presented for this Court's review were:

> 1. Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be cloaked with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen," in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).
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> 2. Is immediate review by this Court necessary to address the growing inter-circuit conflict on the question of whether a public employee's purely job-related speech is constitutionally protected, especially where the lack of uniformity dramatically impacts the ability of all public employers to effectively manage their respective agencies?

Garcetti v. Ceballos, Petition for Writ of Certiorari, at (i) (U.S. 04-473) (filed Oct. 1, 2004).

In the facts underlying that case, Ceballos was a deputy district attorney who was assigned to investigate accusations that a deputy sheriff had lied, or, at a minimum, "grossly misrepresented the facts" in swearing out a search warrant affidavit. *Ceballos v. Garcetti*, 361 F.3d 1168, 1171 (9th Cir. 2004). Ceballos prepared a memorandum reporting his findings. He was later called upon, by defense counsel, to testify at a suppression hearing. By virtue of doing so, Ceballos claimed that he was subject to retaliatory action by his employer. *See id.* at 1171–72. On defendant's summary judgment motion, the district court ruled that the relevant

speech was not of "public concern." The court of appeals reversed, holding that the speech involved was of public concern, notwithstanding Ceballos's private motivations in making it, that the matter involved the internal operating procedures of the Los Angeles district attorneys' office, or that it was made in furtherance of an employment responsibility. *See id.* at 1173–76. The court of appeals expressly rejected a *per se* rule that would categorically deny protection for speech that occurs within the scope of employment responsibilities. *See id.* at 1175–78. This Court presumably granted review to resolve this threshold inquiry for public employee speech as being of "public concern."

2. Respondent's submissions notwithstanding, Dr. Rushing's public statements—issued in the form of grievances to his university—are analytically similar to those of Respondent in *Garcetti*. Dr. Rushing's first grievance concerned the basis and rationale "for professional funding through the Research and Grants Committee of Southeastern Louisiana University" and whether such complied with "the principles of intellectual and scholarly merit and . . . equality of access to funding for all full-time University faculty." Pet. App. 2a. Petitioner's grievance applied not only to his own personal situation—in regards to the University's grant support for a creative endeavor, in particular, and other public performances and arts funding, in general – but also "to other members of the faculty on grounds related to our membership in a particular group . . . ." *Id.*

The Louisiana court of appeals held that Petitioner's speech "relat[ing] to the university's decision not to fund Dr. Rushing's request to participate in an opera, an internal administrative decision, on a matter personal to Dr. Rushing," and thus was not a matter of public concern. Pet. App. 10a. This establishes precisely the same *per se* rule of

disqualification for speech dealing with "internal matters" or "scope of employment responsibilities," rejected by the *Garcetti* court of appeals, and exactly the issue accepted by this Court in that Petition. It is simply disingenuous for the Respondent to suggest that Dr. Rushing's case is so peculiarly fact-bound as not to be potentially affected by any ruling this Court may make in *Garcetti*.

3. The Petition also raises significant questions concerning this Court's employment retaliation jurisprudence and the cognizability of property interests of academic teaching, research and service at public universities, separate and apart from the First Amendment issues discussed above. For example, Respondent appears to concede that the relevant standard employed by the Louisiana courts, in the proceedings below, was the "but for" test of causality for employment retaliation, followed by the U.S. Court of Appeals for the Fifth Circuit, in such cases as *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999); *See* Op. Cert. at 11. As Petitioner has already explained, *See* Pet. 18–24, use of the "but for" test of retaliation causality is a minority position taken by only a handful of circuits, and appears to fundamentally contradict this Court's recent ruling in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003). Petitioner submits that if the Louisiana courts had applied a different standard of retaliation causation, they may well have reached a different result in this case. By its silence, Respondent apparently agrees.

Lastly, Respondent attempts to paper over a conflict in the circuits concerning cognizable property rights for academics at public universities who are the subject of employment action that does not necessarily result in a change in rank or pay. In *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895 (8th

Cir. 1994), and in *Wozniak v. Conry*, 236 F.3d 888 (7th Cir. 2001), courts of appeals have recognized that teachers at public institutions had a cognizable property interest in the nature of their professional duties, not just their nominal pay grade or rank. As Petitioner has already discussed, *See* Pet. 25–30, he is not asserting a property interest in every aspect of his employment relationship with a public university, but only in regards to these essential characteristics of his teaching and research duties, as well as his access to the grievance procedures promised him as a condition of employment.

CONCLUSION

The petition should be granted, or, in the alternative, held pending the disposition of the petition in *Garcetti v. Ceballos*, No. 04-473.

Respectfully submitted,

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